Nos. 17-1717 and 18-18

In the

Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Establishment Clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross

2. Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Town of Greece v. Galloway*, 572 U.S. 565 (2014), or some other test.

3. Whether *Lemon v. Kurtzman*, 403 U.S. 602 (1971) should be overruled.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes a proper understanding of the Religion Clauses of the First Amendment. The Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

SUMMARY OF ARGUMENT

Respondents assert an unwelcome visual contact with a religious symbol. They were neither compelled to worship nor prohibited from doing so. They simply saw something – a monument that has been in place for nearly a century – and took offense. But the Constitution does not protect against visual offense. Indeed, this Court's Free Speech jurisprudence expressly disavows avoidance of personal offense as a legitimate goal of regulation. Yet, this Court's decision in *Lemon v. Kurtzman*, has created such confusion that a self-proclaimed visual affront is now a major federal case.

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[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

The court below held that because the cross is recognized as a symbol of Christianity, its presence at a public memorial constitutes an endorsement of religion. Further, because of its religious significance, its public ownership and display on public property creates an excessive religious entanglement. In effect, the lower court's opinion creates a per se rule outlawing the display of crosses on public property.

The root of the problem is in the failure to consider the purpose and history of the Establishment Clause. It was meant as a protection of federalism, protecting state establishments from federal interference. Under this protection, states had the freedom to bring existing establishments to an end on their own terms. If the Establishment Clause protects an individual right, it is a right against legal coercion. Here, the respondents have not been coerced to do anything.

This case presents the Court with the opportunity to bring some much-needed clarity to Establishment Clause jurisprudence. The Court should rule that there is no violation in the absence of legal coercion.

ARGUMENT

I. The *Lemon* Test Is Unmoored from the Original Meaning of the Establishment Clause.

In *Town of Greece*, this Court noted that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 572 U.S. at 576. This echoes the concern of former Chief Justice Rehnquist. He noted in his dissent in *Wallace v. Jaffree*, "[I]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). The *Lemon* test is

an example of unsound doctrine built on mistaken understanding of constitutional history. This was the test which the court below applied to this case and it is the test on which the Courts of Appeals have relied to reach opposite conclusions on nearly identical facts.

For example, one appellate court held a public crèche display unconstitutional under the Establishment Clause, while another found it to be constitutional. *Compare Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990) *with American Civil Liberties Union of Kentucky v. Wilkinson*, 895 F.2d 1098 (6th Cir 1990). Another court held that a menorah displayed near a city hall was unconstitutional, while it later held that a menorah displayed at a public school did not violate the Establishment Clause. *Compare Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989) *with Skoros v. New York*, 437 F.3d 1 (2d Cir. 2006). One court even described the doctrinal confusion as "Establishment Clause purgatory." *American Civil Liberties Union of Kentucky v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). Justice Thomas has described it as "an Establishment Clause jurisprudence in shambles" that has "confounded the lower courts." *Utah Hwy Patrol Ass'n v. American Atheists, Inc.*, 565 U.S. 994, 994 (2011) (Thomas, J. dissenting from denial of certiorari).

This confusion is likely because *Lemon* is built on a patently false account of the history and purpose of the Establishment Clause. The *Lemon* Court relied on *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970) which in turn relied on *Everson v. Board of Education*, 330 U.S. 1 (1947). *Lemon*, 403 U.S. at 612 (citing *Walz*, 397 U.S. at 668). *Everson*, however, pos-

its that that Establishment Clause was meant to prohibit any support of religion whatsoever. *Everson*, 330 U.S. at 13-14. The *Everson* Court relied entirely on the experience of Virginia in the debates over that state's Bill for Religious Liberty and assumed that the states that ratified the First Amendment intended to impose Virginia's approach on the entire country. There is simply no basis in the historical record to make such an assumption. The *Everson* Court's claim that Jefferson had a leading role in the drafting and adoption of the Establishment Clause and that the Clause was meant to provide a "wall of separation" between religion and government ignores the fact that Jefferson was not even in the country during the debates over the Establishment Clause and that he attended church services held in the Capitol building while he was President.

A close look at the history demonstrates that the Establishment Clause was meant as a federalism protection for the states rather than as an individual right. *Zelman v. Simmons-Harris*, 536 U.S. at 678 (Thomas, J., concurring). If it does protect an individual right, it is a right against coercion, not a protection against a "personal sense of affront." *See Town of Greece*, 572 U.S. at 589 (plurality opinion), 608 (Thomas, J. concurring).

A. The Religion Clause was added to the Constitution to ensure that the federal government would not interfere with the individual freedom of religion.

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian com-

monwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins and Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, Origins of Free Exercise]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id.* Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id.* Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id.*

This variety of religious establishments allowed colonists to settle in a place that most accommodated their own religious preferences. Even as disestablishment took hold after the Revolution, states viewed religious belief and practice as essential to a civil society. See Mass. Const. of 1780, pt. 1, art. III ("[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality..."); Petition for General Assessment (Nov. 4, 1784), reprinted in C. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (1900 and photo. reprint 1971) ("[B]eing thoroughly convinced that the prosperity and happiness of this country essentially depends upon the progress of religion..."); G. Washington, Farewell Address (Sept. 17, 1796), reprinted in 1 Documents of American History 169, 173 (H. Commager 9th ed. 1973) ("[O]f all the dispositions and habits that lead to political prosperity, religion and morality are indispensible supports...").

This history of varied establishments and trend of disestablishment provided the impetus for the Religion Clauses. Antifederalists were alarmed at the Constitution's failure to secure the individual rights of Americans and were concerned that the federal government would have the power to declare a national religion, thus squelching the practices of religious minorities. *See* Letters from the Federal Farmer (IV) (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also* Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston), Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." Letters from a Countryman (V), N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, supra, 86, 87. As one antifederalist noted regarding the differences between different states, "It is plain, therefore, that we [Massachusetts citizens] require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us." Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra*, 93, 94.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See* Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds.,

1987) [hereinafter The Founders Constitution] ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience"); New Hampshire Ratification of the Constitution (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); New York Ratification of Constitution (July 26, 1788), reprinted in The Founders' Constitution, supra 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); Proposed Amendments to the Constitution, Virginia Ratifying Convention (June 27, 1788), reprinted in The Founders' Constitution, supra 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion").

With these demands from various states in mind, the First Congress set to work to fashion an amendment that would appease these concerns. McConnell, *Origins of Free Exercise*, *supra*, at 1476-77. After debate over the exact wording of the Religion Clause in the House and the Senate, both houses agreed to the final conference committee report. 1 Annals of Cong. 88 (Joseph Gales ed., 1789). From this committee emerged the Religion Clauses as they are known today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

The key term for purposes of this case is "establishment." As noted above, the Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a form of religious observance. Thus, some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts, for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist services. Michael McConnell, *Establishment & Dis-establishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003) [hereinafter McConnell, Establishment & Dis-establishment]. Georgia supported the state church through a liquor tax. *Id.* at 2154. Other states limited political participation to members of the state church. *Id.* at 2178.

States that had establishments feared federal interference. Letters of Agrippa (XII), Mass. Gazette, *(Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist*, supra, 93, 94. That fear was also shared by states that had no establishment. Because of the Supremacy Clause, states were concerned that Congress might impose a federal establishment that would overrule individual state rules. Thus, the First Amendment's "no law respecting an establishment of religion" provision had a clear federalism purpose. Therefore, incorporation of this provision against the states must be understood as protecting state authority to the maximum extent possible consistent with individual liberty lest it be interpreted to require the very thing that it forbids, federal interference with state support of religion. *Zelman v. Simmons-Harris*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 50 (Thomas, J., concurring). The individual liberty protected by the clause is freedom from government coercion of individual religious observance or interference with the form of religious worship.

The prohibition on any law "respecting an establishment of religion" was never meant to be a prohibition on public acknowledgement of religion. It was instead a ban on federal government coercion and federal intrusion on state authority. This distinction is clear from the rich history of religious acknowledgments and exercises by all three branches of government after adoption of the First Amendment.

B. The founders' understanding of the Religion Clauses as a protection for individual religious liberty is reflected in the practices of the three branches of government.

The clearest example of the founders' understanding of the operation of the Establishment Clause is reflected in acknowledgements of religion that were commonplace in every branch of the early federal government. Neither the courts, Congress, nor the President viewed public acknowledgements of religion as a threat to religious liberty. Instead, the founding generation embraced public religious proclamations and practices.

In the executive branch, all of the early Presidents – including Thomas Jefferson, an oft-cited proponent of strict separation between church and state - invoked the name of God in their inaugural address-es. 1 Messages and Papers of the Presidents, 1789-1897 at 382 (J. Richardson ed. 1897). Additionally, Presidents Washington, Adams, and Madison all declared official days of prayer and thanksgiving. *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). In 1800, Congress approved the use of the Capitol Building as a venue for Christian worship. 10 Annals of Cong. 797 (1800). President Jefferson often frequented these services. James Hutson, Religion and the Founding of the American Republic 84, 89 (1998).

Throughout history Presidents often invoked divine guidance and comfort in the midst of troubled times. Examples include President Franklin Roosevelt's prayer for the soldiers who landed on Omaha Beach (Franklin Delano Roosevelt, D-Day Speech

(June 6, 1944), in http://www.historyplace.com /speeches/fdr-prayer.htm); President George W. Bush's address to Congress after the September 11 attacks (George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in 2 Pub. Papers of the Presidents: George W. Bush: 2001, at 1140 (2003)); and President Barack Obama's Newtown address (Barack Obama, Remarks by the President at Sandy Hook Interfaith Prayer Vigil, WhiteHouse.Gov (Dec. 16, 2012), http://www.whitehouse.gov/the-press-office/2012/12/16/remarks-president-sandy-hook-interfaith-prayer-vigil).

This Court also has a long history of religious acknowledgment. "God save this Honorable Court" became the traditional opening of Court as early as Chief Justice Marshall's time - a practice that continues today. C. Warren, 2 The Supreme Court in United States History 469 (1922). Further, John Jay invited members of the clergy to open sessions of the New England circuit court in prayer. 2 The Documentary History of the Supreme: Court of the United States: The Justices on Circuit, 1789-1800, at 13-14 (M. Marcus ed. 1988).

Nowhere in the federal government was religion's influence more pronounced than in the legislative branch. Congress passed laws like the Northwest Ordinance, stating that "Religion, morality, and knowledge being necessary to good government, schools and means of education shall ever be encouraged." Northwest Ordinance of 1787, Art. III., re-enacted as Northwest Ordinance of 1789, ch. 8, § 1, 1

Stat. 50. The first Congress also pressed the President to recommend a day of prayer to the people. 1 Annals of Congress 914-15 (J. Gales ed. 1789). The national motto that adorns our currency has been statutorily decreed to be "In God we trust." 36 U.S.C § 302. Perhaps most tellingly, "in the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674. Notably, one of the Congressmen appointed to draft the bill providing for paid chaplains was James Madison, who is often claimed to be a proponent of strict separation between church and state. *Marsh v. Chambers*, 463 U.S. 783, 788 n.8 (1983).

Not only does Congress still have an office of the chaplain (Office of the Chaplain, United States House Of Representatives, http://chaplain.house.gov/ (last visited December 19, 2018)), but the Capitol Building has a special prayer room set aside for use by members of the House and Senate (*County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in part, dissenting in part)). The House and Senate have a prayer breakfast every Thursday morning, and they sponsor an annual Prayer Breakfast. Alan Cooperman, *Bush Lauds Catholics' Role in U.S. Freedom*, Wash. Post, May 21, 2005, at A6. In the House Chamber, a portrait of Moses faces the Speaker and the national motto of "In God we trust" is etched across the wall behind the Speaker's rostrum. Eugene F. Hemrick, One Nation Under God: Religious Symbols, Quotes, and Images in Our Nation's Capital at 28 (2001). The seals of religious leaders that were lawmakers also adorn the

House Chamber walls, including Popes, saints, a Jewish rabbi, and a Muslim sultan. Id. at 49-51. The Capitol rotunda is emblazoned with a fresco of George Washington ascending into heaven. Architect of the Capitol, Apotheosis of Washington, https://www.aoc.gov/art/other-paintings-and-murals/apotheosis-washington (last visited December 19, 2018). Finally, the front door of the Capitol is adorned with crucifixes and depictions of Popes, Franciscan monks, and rosaries. Architect of the Capitol, The Columbus Doors, https://www.aoc.gov/art/doors/columbus-doors (last visited December 19, 2018).

The United States Capitol is and always has been replete with religious imagery and religious activity, yet none of the traditions or adornments are rightly conceived as a threat to religious liberty. Indeed, the government of the early Republic celebrated our rich religious history with a variety of public acknowledgements, many of which continue today. In view of the founding generation's disposition towards religion in the public square, a correct reading of the Establishment Clause evidences no hostility to public religious acknowledgment. Acknowledgment of religion does not coerce any person to adhere to any particular doctrine nor does it interfere with ecclesiastical decisionmaking.

As this Court noted in *Town of Greece*, the Establishment Clause must be interpreted "by reference to historical practices and understandings." *Town of Greece*, 572 U.S. at 576. More importantly, it must be interpreted in accord with its original understanding and its purpose in protecting religious liberty. The *Lemon* test does not advance any of the liberties sought to be protected by the Founding Generation in

relation to religious liberty. Instead, it serves to create confusion in the lower courts and worse, to exclude religion from the public square. Justice Scalia once referred to the *Lemon* test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). It is time that this Court heed Justice Scalia's advice and "drive a pencil through the creature's heart," finally putting *Lemon* to rest. *Id.*

II. This Court Should Use this Case to Announce a New Test for Reviewing Establishment Clause Claims Based on Legal Coercion

The *Lemon* test is a failed experiment in altering the Establishment Clause in a manner that ultimately defeated the purpose of protecting individual rights in religion. Instead of protecting against coercion of individuals or government interference in ecclesiastical decisions, the test has been used as a weapon in a campaign to purge religion from the public square. The time has come to return to the original understanding of the First Amendment as a protection for individual freedom of religion.

The appropriate standard for judging whether a government action interferes with the individual freedom of religion protected by the Establishment Clause will focus on preventing governmental interference and coercion. Such a test must proscribe "actual legal coercion," *Newdow*, 524 U.S. at 52 (Thomas, J., concurring), such as "coercion of religious orthodoxy...under force of law or threat of penalty, *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). If the

power of government is not used coercively to compel adherence to a particular belief or support of a particular church, there is no establishment.

At the same time, the Court's test must continue to prevent government interference in ecclesiastical decisions. Government, for example, cannot be allowed to interfere in the selection of ministers. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 183-84 (2012). Nor can government dictate mode or content of worship and prayer to which individuals and churches must adhere. *See Engel v. Vitale*, 370 U.S. 421, 425 (1962).

A test focused on legal coercion will not be concerned if an individual is "personally affronted" with a statue or war memorial. *Town of Greece*, 572 U.S. at 589 (plurality opinion), 610 (Thomas, J., concurring). Instead the focus will be on whether the individual is being compelled, by force of law, to adhere to a particular religion or to refrain from practicing a religion. This is a test that is both true to our constitutional history and easy to apply by the lower federal courts.

CONCLUSION

The Constitution is not offended by the mention of religion or even any particular religion. Instead, violation of the Establishment Clause, as originally understood, lies only in actual government coercion of the individual. This Court should consign the *Lemon* test to the dustbin of history and instead announce a test based on legal coercion for Establishment Clause challenges.

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